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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion for the purpose of considering policies and guidelines regarding the allocation of gains from sales of energy, telecommunications, and water utility assets.	))))))	R.04-09-003 (filed September 9, 2004)

JOINT RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY [U338-E], PACIFIC GAS AND ELECTRIC COMPANY [U39-M], SAN DIEGO GAS & ELECTRIC COMPANY [U902-M] AND SOUTHERN CALIFORNIA GAS COMPANY [U904-G] TO APPLICATION FOR REHEARING OF DECISION NO. 06-05-041

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Dated: July 14, 2006

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Pursuant to Rule 86.2 of the Rules of Practice and Procedure (Title 20, Cal. Code Reg'ns) of the California Public Utilities Commission (the "Commission"), Southern California Edison Company ("SCE"), Pacific Gas and Electric Company ("PG&E"),[1] San Diego Gas & Electric Company, and Southern California Gas Company ("SDG&E/SoCalGas") (collectively, the "Joint Energy Utilities"), hereby submit the following response to the application for rehearing of Decision No. 06-05-041 (the "Final Decision") filed jointly by the Division of Ratepayer Advocates and The Utility Reform Network (collectively, "DRA/TURN").

I.

PREFATORY STATEMENT

In the nearly two years that have elapsed since the Commission set forth its tentative views and proposals in the rulemaking order that initiated this case, reams of paper have been

[1] In addition to its joint sponsorship here, PG&E will file a separate response to the rehearing application.

filed by the stakeholders in this matter providing various and disparate views of the policy, law, and facts affecting the allocation of gains and losses on the sale of utility assets. A draft decision was issued, robustly commented upon, and substantially revised. An alternate decision was submitted, and copiously commented upon. The matter was originally calendared for the Commission's meeting on December 15, 2005 and held eight times for further consideration over nearly six months. Numerous Escutia drafts were circulated that reflected various proposals and counterproposals – a goodly number of which were ultimately rejected. On May 25, 2006, a divided Commission voted out a 3-2 final decision. A spirited dissent followed. Everyone had their say, and the case should be over.

The DRA/TURN rehearing application does not present a single argument that has not already been presented, considered, and rejected in this proceeding. The rehearing application does not state a single legal error that renders the Final Decision vulnerable to judicial review. When all is said and done, DRA/TURN are really just asking the Commission one more time to change its mind. Because this application for rehearing fails to state any legal error whatsoever, it must be rejected, and this case must be allowed to conclude once and for all.

II.

THE COMMISSION'S FINDINGS ARE SUPPORTED BY EVIDENCE AND CONSISTENT WITH THE COMMISSION'S FINAL RULING

DRA/TURN's complaints that the Commission's conclusion is not consistent with its policy discussion, that the allocation mechanism is too rich for shareholders, and that DRA/TURN's construction of the evidence is superior to the Commission's, have all been made before in this proceeding.[2] They are as invalid now as they were when the Commission

[2] *See generally* JOINT OPENING COMMENTS OF DRA AND TURN (January 5, 2006) at 4-8; JOINT COMMENTS OF THE DRA AND TURN ON ALTERNATE DECISION OF COMMISSIONER RACHELLE B. CHONG (April 17, 2006) at 10-11.

considered and rejected them before. Moreover, it is a misuse of the rehearing process to merely reargue their original case in yet another attempt to convince the Commission to change its mind.

A. The Decision Does Not Violate Section 1705 and Is Not Vulnerable to Appeal

DRA/TURN's claim that the Decision "violates Section 1705 . . . because the conclusions are inconsistent with the record"[3] is incorrect. Viewed through the prism of the applicable legal standard,[4] it is clear that the Commission's findings are supported by the record. At most, DRA/TURN argue that the record could be interpreted differently to support their preferred outcome. That preference, however, does not constitute legal error: "If . . . substantial evidence be found, it is of no consequence that the [tribunal] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 362 at 412, *quoting Bowers v. Bernard* (1984) 150 Cal.App.3d 870. Thus, the fact that the vigorously contested evidence in this proceeding might have supported *different* findings does not establish that the evidence does not support the findings the Commission made.

The Commission's ultimate ruling is consonant with its findings of fact and conclusions of law, when viewed fully and fairly as a whole. Once again,[5] DRA/TURN dramatically overstate the significance of perceived discrepancies between the subjective nature of certain

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[3] Rehearing Application at 1.

[4] To begin at the beginning, a brief review of the actual legal standards by which Commission error is determined, and the need for judicial review is assessed, may be helpful here. The Commission proceeds in a manner required by law when it follows its own rules and procedures, *Civil Service Comm'n v. Velez* (1993) 14 Cal.App.4th 115, 118-19, 17 Cal.Rptr.2d 490, and relies upon the proper legal standard to adjudicate the rights of the parties. *No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, 88, 118 Cal.Rptr. 34. The Commission is entitled to a presumption that its findings are supported by substantial evidence. *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335, 25 Cal.Rptr.2d 842. Consequently, the courts must defer to the Commission on questions of fact that are supported by substantial evidence. *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 374, 78 Cal.Rptr.2d 44. The California Supreme Court has defined "substantial evidence" as of "ponderable legal significance . . . reasonable in nature, credible, and of solid value." *Olsevit v. Trustees of California State Universities and Colleges* (1978) 21 Cal.3d 763, 773 n.9, 21 Cal.Rptr.2d 1. In assessing whether a Commission decision in supported by the findings (Section 1757(a)(3)), the Supreme Court has directed reviewing courts to take into account and to defer to the Commission's interpretation of statutes and regulations within its administrative jurisdiction, based upon the Commission's expertise in these legal and regulatory issues. *Yamaha v. State Board of Equaliz'n* (1998) 19 Cal.4th 1, 11, 78 Cal.Rptr.2d 1.

[5] DRA/TURN already took issue with the Commission's use of adjectives like "major," "minor," and "lion's share" in comments to the Draft Decision and the Alternate Decision. *Cf. infra* n.2.

qualifying adjectives sprinkled throughout the text of the Final Decision, on the one hand, and the Commission's ultimate ruling adopting a 50:50 sharing of gains/losses on sales of nondepreciable property, on the other.[6] These are not meaningful inconsistencies, certainly not sufficient to render the decision vulnerable to legitimate challenge under Section 1705 of the Public Utilities Code.

By focusing fixedly on the numerical components of the allocation rule, DRA/TURN fail to acknowledge that the Commission was presented with the strongly held policy views of a number of parties that gains from sales of nondepreciable utility assets should be allocated predominantly or entirely to shareholders,[7] and the extant law to that effect in certain jurisdictions.[8] The Commission *did* determine to allocate 100% of the gains from sales of depreciable property to ratepayers. And the rule adopted here determines not only how the rewards of gains are enjoyed, but also how the burdens of losses are borne. Seen in this context, the Commission's decision is supported by the record and the findings, and reflects a deliberate balance of the various philosophical positions that were considered.

If the Final Decision reads as if it had been stirred by many cooks, perhaps that's because it was. As DRA/TURN concede in their rehearing application, the Final Decision reflects considerable compromise. There are sufficient findings, and a sufficient record supporting those findings, to justify the Commission's ultimate compromise solution that ratepayers and shareholders are entitled to share the gains equally – and responsible for bearing the losses equally – on sales of nondepreciable utility assets.

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6 For example, DRA/TURN place great stock in the appearance of the term "lion's share" in an appendix, claiming it renders the entire Final Decision "arbitrary and not the result of reasoned decisionmaking." Rehearing Application at 3. DRA/TURN go so far as to attempt to demonstrate that the term "lion's share" should be interpreted as "100%" or some approximation thereof. *Id.* While DRA/TURN's etymological analysis of the euphemism is certainly a novel argument, it hardly constitutes a legal justification for challenging the integrity of Commission's decisionmaking. Moreover, it must be noted that retention of the term "lion's share" on the last page of the last appendix to the Final Decision appears to be an editing oversight, since all other uses to the term which had contemporaneously popped up in earlier drafts, were subsequently excised, along with other, similar qualifying adjectives. That the Commission missed one is not an error of law.

7 *See, e.g.,* COMMENTS OF SDG&E/SOCALGAS (November 3, 2004), at 6-11.

8 COMMENTS OF SDG&E/SOCALGAS (November 3, 2004), at 22-24.

B. DRA/TURN Continue to Mischaracterize SCE's OOR Mechanism

SCE cannot fathom how, in the face of clear evidence to the contrary, DRA/TURN can continue to assert wrongly that "Southern California Edison Company (SCE) for many years allocated 90% or more of [gains from sales of nondepreciable property] to ratepayers." DRA/TURN quote this argument no less than four different times in putative support for their various propositions.[9] SCE is frustrated by this continuing mischaracterization of its Other Operating Revenue ("OOR") mechanism, and the Joint Energy Utilities share SCE's frustration.

At the beginning of the proceeding, SCE described its OOR mechanism,[10] and in response to DRA/TURN's apparent confusion, SCE further clarified how the OOR mechanism works in two different sets of comments.[11] Each time, SCE unequivocally explained that its OOR mechanism does not now use, and has never used, a 90:10 ratio for allocating gains on sales between ratepayers and shareholders. It cannot be more plainly stated.[12]

III.

DECLINING TO OVERTURN *REDDING II* IS NOT LEGAL ERROR

More than six months ago, in response to the Draft Decision, DRA/TURN made the very same argument they make here: namely, that even limited ratification of Decision No. 89-07-016 (*Redding II*")[13] is inconsistent with the policy rationales in the decision.[14] The Commission

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9 Rehearing Application at 3, 7, 8, and 12.

10 SCE'S INITIAL COMMENTS TO OIR REGARDING ALLOCATION OF GAINS ON Sale (November 3, 2004), at 23-24.

11 SCE'S REPLY COMMENTS TO DRAFT DECISION OF COMMISSIONER BROWN (January 17, 2006) at 2-4; SCE'S REPLY COMMENTS TO ALTERNATE DECISION OF COMMISSIONER CHONG (April 24, 2006), at 2.

12 In its reply comments to the Chong Alternate, SCE explained: "To recap: in D.87-12-066, SCE and Commission staff agreed to credit OOR with a five-year average of the *entire* [emphasis in original] gain from property sales for such time as the property was held in rate base. Use of the term "entire" means that **100%** [emphasis in original] of any gain is credited to ratepayers, pro-rated to reflect the relative time that the property was held in rate base [footnote omitted]. SCE is not required to, and does not, apply a 9/10 allocation of gains on sales of property through the OOR mechanism." *Id.* at 2.

13 *Re Ratemaking Treatment of Capital Gains Derived From the Sale of a Public Utility System Serving an Area Annexed by a Municipality or Public Entity* (1989) 32 CPUC2d 233.

14 JOINT OPENING COMMENTS OF DRA AND TURN (January 5, 2006) at 2.

rejected DRA/TURN's argument then, and even if it were proper to reconsider it now – and it is not – the Commission must reject it again.

Ratification of the *Redding II* doctrine is by no means inconsistent with the new gain/loss on sales rules enunciated in the Final Decision. Simply stated, *Redding II* deals with the particular situation in which a utility liquidates a portion of its service territory by transferring to a municipality *both* the utility assets *and* the franchise obligation to serve customers in the affected area.[15] As previously noted to the Commission, this partial liquidation scenario involves public policy considerations distinct from those to which the new gain/loss on sale rules will apply.[16] As SDG&E/SoCalGas observed:

> [T]here has been no uncertainty in the minds of utility managers for the past 15 years over the outcome of in situations that fall within the ambit of [*Redding II*]. The Commission has been consistent in applying [*Redding II*] dozens and dozens of times in that period, without deviation. The circumstances in which that precedent applies are clear-cut. In addition, there has been no drain on the Commission's resources to apply [*Redding II*] because it has a fixed rule and does not result in any case-by-case debate.[17]

As recently as 2001, the Commission explicitly reaffirmed *Redding II* as "a well-settled issue."[18] The *Redding II* doctrine is "clearly established, easy to apply, and has been uniformly followed in numerous cases. . . . without apparent confusion."[19] There is no legal error in voting to retain a proven, efficient mechanism by declining to overturn an often-cited, well-settled case. The

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15 In this context, allocation of the gain on sale to shareholders makes eminent sense. Through the sale of an operating system, the utility foregoes all future revenues (including shareholder return) from those assets. Ratepayers are held without risk since rate base is reduced by the amount of the undepreciated plant. Because these assets will no longer provide revenues to the shareholders and ratepayers have been made whole, the gain/loss risk is assumed by the utility. Further, it is not in a utility's interest to sell operating systems; such sales usually occur as a result of Commission mandate or as a result of "competitive" pressures." *See e.g.,* COMMENTS OF PG&E ON OIR (November 3, 2004) at 12-16.

16 COMMENTS OF PG&E ON OIR (November 3, 2004) at 15; see also COMMENTS OF SDG&E/SOCALGAS (November 3, 2004), at 24-27; REPLY COMMENTS OF SDG&E/SOCALGAS ON DRAFT DECISION OF COMMISSIONER BROWN (January 17, 2006); SCE'S INITIAL COMMENTS TO OIR (November 3, 2004) at 24-25.

17 COMMENTS OF SDG&E/SOCALGAS (November 3, 2004), at 25.

18 *Application of Citizens Telecommunications and GTE California* (D.01-06-007) at 82 (*mimeo*). Indeed, the Commission specifically rejected arguments that gains from the sale be allocated entirely to ratepayers, or split between ratepayers and shareholders. *Id.* at 83 n.142.

19 SCE'S INITIAL COMMENTS TO OIR (November 3, 2004) at 24.

Commission was entitled to conclude, as a matter of law that "[w]e should continue to apply the principles of our *Redding II* decision in the narrow circumstances to which they were designed to apply"[20] and that "[w]e have not been presented with an adequate record to justify broadening or narrowing *Redding II*'s scope."[21] The Commission's retention of its own precedent is not erroneous as a matter of law.

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[20] Final Decision, Conclusion of Law No. 8.
[21] Final Decision, Conclusion of Law No. 9.

IV.

CONCLUSION

For each and all of the foregoing reasons, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Gas Company jointly request the Commission deny the application for rehearing in the above-captioned matter.

Respectfully submitted,

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July 14, 2006

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of JOINT RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY [U338-E], PACIFIC GAS AND ELECTRIC COMPANY [U39-M], SAN DIEGO GAS & ELECTRIC COMPANY [U902-M] AND SOUTHERN CALIFORNIA GAS COMPANY [U904-G] TO APPLICATION FOR REHEARING OF DECISION NO. 06-05-041 on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

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Executed this **14th day of July, 2006**, at Rosemead, California.

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